FILE COPY

No. [redacted] 19

In the Supreme Court of the United States

OCTOBER TERM, 1937

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND ITS AFFILIATED COMPANIES, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute	3
Statement	4
Argument:	
Introduction	15
I. The holding of the court below that the Act may validly be applied to petitioners is in accordance with the principles approved by this Court at the last and during the current Term; those principles are so fully controlling of the present case as not to require review by this Court	17
II. The Board's procedure in this case was entirely proper: petitioners' claims that they were denied due process are without merit and require no review by this Court	24
A. Paragraph 1 (f) of the Board's order requiring petitioners to cease and desist from giving effect to their collective bargaining contracts was in all respects valid and proper under the Act	24
B. The transfer of the proceedings to the Board in Washington, before filing of an intermediate report by the trial examiner, raises no constitutional issue	30
C. Petitioners' contention that the Board improperly refused to hear evidence in their behalf is without merit	31
Conclusion	32
Appendix	33

CITATIONS

Cases:	
Aikens v. *Wisconsin*, 195 U. S. 194	25
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282	21
Duplex Printing Co. v. *Deering*, 254 U. S. 443	26
Lemke v. *Farmers Grain Co.*, 258 U. S. 50	21
Local 167 v. *United States*, 291 U. S. 293	21
Minnesota Rate Cases, 230 U. S. 352	22
Morgan v. *United States*, 298 U. S. 468	16, 30

Cases—Continued. Page.

National Labor Relations Board v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 17

National Labor Relations Board v. *Fruehauf Trailer Co.*, 301 U. S. 49 17

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ..... 15, 17, 18, 19, 20, 21, 31

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, decided Feb. 28, 1938 ..... 25, 26

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, decided March 28, 1938 ..... 15, 17, 18, 19, 21, 22

Schenck v. *United States*, 249 U. S. 47 25

Second Employers' Liability Cases, 223 U. S. 1 22

Shreveport Case, 234 U. S. 342 22

Swift & Co. v. *United States*, 196 U. S. 375 25

United States v. *Reading Co.*, 226 U. S. 324 25

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 23

Wisconsin Railroad Commission v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563 22

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, sec. 151 *et seq*) 33

Miscellaneous:

National Labor Relations Board Rules and Regulations: Series 1, as amended, Art. II, Sec. 37 7

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 916

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND ITS AFFILIATED COMPANIES, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1737–47) has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 65–130) have not yet been reported.

JURISDICTION

The decree of the court below (R. 1748) was entered on March 21, 1938. The petition for a writ of certiorari was filed and served on April 2, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10, paragraphs (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act may validly be applied to a public utility system engaged in the business of distributing electric energy, gas, and steam wholly within the State of New York, which receives the major portion of the raw materials, supplies, and equipment used in its production operations from states other than New York, and which sells substantial quantities of electric energy, gas, and steam to various important private and governmental enterprises engaged in interstate and foreign commerce, including agencies and instrumentalities of such commerce, which are dependent in their operations upon the uninterrupted supply by petitioners of electric energy, gas, or steam.

2. Whether petitioners were denied due process of law by reason of the fact:

(a) That they were ordered to cease and desist from giving effect to certain collective bargaining contracts executed after the complaint was issued.

the invalidity of which was not in terms asserted at the hearings, where the contracts, having been admitted in evidence, were found to have been executed in continuation and culmination of the unlawful coercion of employees charged in the complaint, and where petitioners themselves introduced evidence concerning the contracts and raised the issue of their effect by claiming that their execution had rendered the charge of coercion moot;

(b) That no Intermediate Report was made by the Trial Examiner;

(c) That the Board declined to permit certain of petitioners' witnesses, who were available and could have been produced at the close of the Board's case, to testify at an adjourned hearing subsequently held for the sole purpose of taking the testimony of certain other of petitioners' witnesses theretofore unavailable, where petitioners were afforded the opportunity to call all available witnesses prior to such adjourned hearing and did not thereafter pursue their statutory right to apply to the court below for leave to adduce such additional testimony.

STATUTE

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are set forth in the Appendix hereto.

STATEMENT

Pursuant to a charge duly filed by the United Electrical and Radio Workers of America, a labor organization (herein called the United) (Bd. Exh. 1, R. 4–6), the National Labor Relations Board, by its Regional Director at New York City, issued its complaint against petitioners on May 12, 1937 (Bd. Exh. 1, R. 7–16). In addition to certain jurisdictional allegations, the complaint, as thereafter amended (R. 40–1, 164–5, 405–9, 525–6), alleged that petitioners had employed and were employing industrial spies for the purpose of ascertaining the union activities of their employees; that petitoners had discharged and thereafter had refused to reinstate, certain named employees because of their union activities; that petitioners had contributed and were contributing financial and other support to the International Brotherhood of Electrical Workers, a labor organization (herein called the Brotherhood), and had coerced and were coercing their employees to join or assist the said Brotherhood; and that by all of the foregoing acts, petitioners had engaged and were engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (2), and (3), and Section 2, subdivisions (6) and (7) of the Act (Bd. Exh. 1, R. 7–16).

Copies of the complaint and of a notice of hearing thereon were duly served upon petitioners; and the United and the Brotherhood were given notice

thereof [1] (Bd. Exh. 1, R. 16–18). Petitioners, appearing specially, filed a motion to dismiss the complaint on jurisdictional grounds (Pet. Exh. 3, R. 19–33).[2] Pursuant to an amended notice of hearing served upon petitioners, with notice to the United and the Brotherhood (Bd. Exh. 1; R. 34–6), a hearing was held on June 3, 10, 11, 14, 15, 16, 17, 23, 24, and July 6, 1937, at New York City, before a Trial Examiner duly designated by the Board (Bd. Exh. 1, R. 37). On June 16, 1937, during the hearing, petitioners filed an answer to the complaint as amended which reserved their jurisdictional objections, denied the alleged unfair labor practices, and set forth certain affirmative defenses to the Board's jurisdiction (Pet. Exh. 7, R. 42–63).

At the close of the Board's case the Trial Examiner granted petitioners' motion to amend its answer to include, as a separate defense, allegations that certain contracts executed by petitioners and certain locals of the Brotherhood had rendered the issues moot (R. 1200–01).

Petitioners' counsel then requested an adjournment until July 6, 1937, to enable him to prepare

[1] The sufficiency of the notice to the Brotherhood is challegend in the petition for certiorari (No. 957) filed by the Brotherhood to secure a review of the decision of the court below. The petitioners herein in their Memorandum in Support of Motion for a Stay, filed in the court below, have acknowledged (p. 5) that "The IBEW was given notice of the pendency of the proceeding."

[2] This motion, later renewed, was denied (R. 1198–1201). Other rulings during the hearing not material here are not discussed.

petitioners' case, and in particular to secure the testimony of Floyd L. Carlisle and and Harold Dean, both of whom were said to be unavailable and whose testimony was asserted to be indispensable (R. 1186–92). The sole reason offered for not calling witnesses at the close of the Board's case was that the Board had completed the presentation of its case sooner than had been anticipated by petitioners' counsel (R. 1188), although counsel for the Board had announced on June 23 that the Board's case would be completed on the following day (R. 1102). The Trial Examiner, on June 24, after having offered to recess the hearing until June 25 for the purpose of receiving the testimony of any of petitioners' witnesses who were available (R. 1311), granted the adjournment to July 6 for the purpose of receiving the testimony of Carlisle, who was said to be abroad, and reserved decision until the hearing was resumed on July 6 whether the testimony of Dean, who was said to be in Milwaukee, and of other witnesses, would be received (R. 1192).

Pursuant to permission granted, petitioners presented this matter directly to the Board by letter dated June 28, 1937 (Pet. Exh. 25, R. 1463–6). The Board by reply letter, dated July 2, 1937, stated that it would permit both Carlisle and Dean to testify on July 6, but would not permit any other witness then to testify on the ground that such available witnesses should have been produced upon completion of the Board's case (Pet. Exh.

25 (a), R. 1467). After the testimony of Carlisle and Dean had been received on July 6, 1937, the Trial Examiner, in accordance with the Board's directions, refused to permit a witness called by petitioners to testify concerning the discharge of Stephen L. Solosy (R. 1309–13). Petitioners then made an offer of proof concerning the discharge of Solosy and of Philemon Ewing (R. 1314–5). As to Ewing no discriminatory discharge had been alleged nor did the Board make any order respecting his discharge. No offer of proof as to any other matter was tendered by petitioners (R. 1316). On July 15, 1937, petitioners submitted a brief (R. 71).

By order of the Board, dated September 29, 1937, the proceeding was transferred to and continued before the Board in accordance with Article II, Section 37, of the National Labor Relations Board Rules and Regulations, Series 1, as amended (R. 64). No oral argument was had, none having been requested by petitioners. On November 10, 1937, the Board issued its decision affirming the rulings of the Trial Examiner and setting forth its findings of fact, conclusions of law, and order (R. 65–130). The facts, in brief, as disclosed by the Board's findings, are as follows:[3]

[3] The references in the following statement are to the Board's findings, which summarize the evidence in ample detail. To make reference to the extensive supporting evidence in the lengthy record would burden the Court unnecessarily, particularly since petitioner does not contest the sufficiency of the evidence in any specific respect.

Petitioners operate as a system under a unified ownership and management. The system is engaged in the business of supplying electricity, gas, and steam to consumers in New York City and Westchester County, New York. In 1936 the system supplied 97.5 per cent of the total electric energy sold in New York City and practically all of the electric energy sold in Westchester County. It supplied 55.3 per cent of the total gas sold in New York City. It is the only public utility supplying gas in Westchester County; and is the only central-station steam utility in New York City.* As of April 17, 1937, the system employed 42,101 employees. The total annual pay roll for 1936, including annuities and separation allowances paid, was $81,891,990.40 (R. 72–77).

The major portion of the raw materials, supplies, and equipment used in the production of all the electric energy, gas, and steam sold by petitioners moves to their plants from states other than New York. Coal and oil are the principal raw materials. All but an insignificant portion of the

* In 1936 the system generated and purchased 6,038,989,792 kilowatt-hours of electric energy and sold 5,130,976,460 kilowatt-hours. The total revenue from the sale of electric energy amounted to $180,448,596.19. During the same period the system produced 39,286,022,000 cubic feet of gas and sold 38,016,134,000 cubic feet. The total revenue from the sale of gas amounted to $41,163,261.69. The total revenue from the sale of steam during 1936 was $10,761,341.04. The revenue from the sale of coal and oil by-products was $3,485,338.01. This revenue is treated as an abatement of production expenses (R. 76).

approximately 5,000,000 tons of coal utilized in 1936 was mined in other states and shipped directly to petitioners' plants, where it was unloaded and handled by petitioners' own equipment and employees. All of the approximately 115,000,000 gallons of oil consumed in that year was received in interstate commerce. Substantial quantities and proportions of cable, copper, and other materials and supplies are purchased from suppliers located outside the state (R. 77–8).

The electric energy, gas, and steam produced by petitioners is sold and supplied to various important businesses engaged in interstate and foreign commerce, all of which are vitally dependent for their existence and operation upon the use of such electric energy, gas, and steam. Thus, petitioners supply the electric energy used by various interstate railroads for the operation of interstate trains and interstate passenger and freight terminals. In 1936 petitioners supplied a total of 261,608,501 kilowatt-hours of electricity to the New York Central Railroad, the New York, New Haven and Hartford Railroad Company, and the Hudson and Manhattan Railroad Company. The steam supplied is used to operate compressors for the switches in the interstate railroad tunnel of the Pennsylvania Railroad under the North River. Petitioners also supply electricity to the Port of New York Authority for the operation of its terminal and the Holland tunnel (R. 78–80). In the fields of interstate and foreign communication, equally de-

pendent upon petitioners are the Western Union Telegraph Company, the Postal Telegraph Company, the New York Telephone Company, RCA Communications, Inc., and Columbia Broadcasting System, Inc. In navigation, petitioners supply energy used in the operation of piers, slips, wharves, and terminals of steamship companies, and of interstate ferries. Related service is furnished lighthouses and other devices in aid of navigation in New York harbor (R. 80–2). Into a miscellaneous but important class of customers fall, *inter alia*, the following: the post-offices and the United States Barge office and Custom Houses; the Floyd Bennett Air Field; the Dow-Jones and Company, Inc., ticker service; the New York Stock Exchange; and the New York Times; all of which depend upon petitioners for electricity for their interstate operations and activities (R. 80–2). In addition, the numerous commercial and manufacturing enterprises engaged in interstate commerce in New York City are dependent upon petitioners for the power and light necessary to carry on their business.

With respect to the unfair labor practices, the Board's findings establish that in 1933, as a means of purported compliance with the collective bargaining provisions of the National Industrial Recovery Act, petitioners conceived and initiated, and thereafter entirely supported, certain Employee Representation Plans (R. 85–91). After the pas-

sage of the present Act petitioners employed the Plans as a means of preventing free self-organization among their employees. As late as April 1937, when the United was conducting a campaign for membership among petitioners' employees, petitioners countered with their own campaign to force the employees to pledge adherence to the Plans (R. 90).

When the April 1937 decisions of this Court sustaining the Act were rendered, petitioners formally abandoned the Plans and simultaneously had recourse to the Brotherhood. In brief, after two hasty conferences with the International President of the Brotherhood, and the submission of a contract in which it was proposed that the Brotherhood be recognized as the representative of its members, but without seeking to ascertain the desires or views of their employees upon the subject, and without making any inquiry as to what number of their employees belonged to the Brotherhood, petitioners precipitately announced at a specially called meeting that they had decided to recognize the Brotherhood. Despite vigorous protest by the employees, and in complete disregard of a request by the United for a conference, petitioners immediately dispatched a letter to the International President recognizing the Brotherhood. At this meeting petitioners' principal executive explained petitioners' course of action to the employees on the ground that labor organizations had become neces-

sary evils, in view of this Court's decisions and of legislation similar to the Act then pending in the New York State Legislature, and that as between the United and the Brotherhood petitioners preferred the latter (R. 91–93).

According to plan, there were then quickly set up throughout petitioners' system seven Brotherhood locals, and there was set in motion a vigorous campaign to intimidate, influence, and coerce the employees into joining the Brotherhood. Brotherhood organizers were permitted to solicit membership in the plants during working hours, while United organizers were turned out of the buildings. Various of petitioners' officials expressed their views in favor of the Brotherhood. Employees were solicited to join the Brotherhood by department heads, foremen and other employees engaged in supervisory capacities, and the solicitation was accompanied by admonitions and even threats. Brotherhood dues were collected on petitioners' premises and Brotherhood organizers were permitted to occupy offices of foremen for that purpose. Officers of the Employee Representation Plans, who had now become officers of the Brotherhood locals, were allowed to continue in the exercise of their prerogatives on behalf of the Brotherhood during working hours, using petitioners' offices and secretarial services, utilizing their expense accounts, and being paid their regular salaries nonetheless (R. 93–99).

Following the establishment of the Brotherhood locals and the obtaining of a membership therein in th manner above described, petitioners between May 28 and June 16 entered into seven substantially similar contracts with the seven Brotherhood locals, thus executing the last act in completion of the *coup* determined upon at the outset as a means of controlling the selection by their employees of representatives for collective bargaining purposes (R. 99–102). Although these contracts recognized the Brotherhood as the representative of its members and were applicable only to such members, petitioners construed them as exclusive collective bargaining agreements and freely admitted that they would not bargain collectively with any other labor organization during the existence of these contracts (R. 100–102).

In addition, the Board found that petitioners had employed industrial spies and operators for the purpose of uncovering the union activities of their employees (R. 103–105), and that petitioners had discharged six employees because of their union activity and had thereby discriminated against them in regard to hire and tenure of employment (R. 106–125). All of the aforementioned acts, the Board found, tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof (R. 125). The Board concluded that petitioners had engaged in unfair labor practices affecting commerce, within the meaning of Section

8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act. The Board dismissed the complaint in so far as it alleged violation of Section 8 (2) of the Act (R. 127).

Upon the basis of these findings, the Board in addition to requiring petitioners to reinstate to their former positions with back pay six named employees discharged for union activity, directed petitioners, in substance, to cease and desist (a) from discouraging membership in the United by any manner or means of discrimination, or encouraging membership in the Brotherhood by any manner or means of persuasion, intimidation, or coercion, (b) from permitting any representatives of the Brotherhood or any other labor organization to engage in union activities during working hours or on petitioners' property unless like privileges were granted the United and all other labor organizations of their employees, (c) from permitting petitioners' employees who were officials of its Employees' Representation Plans to use petitioners' time, property, and money on behalf of the Brotherhood or any other labor organization, (d) from employing detectives or other means of espionage to investigate their employees' union activities, and (e) from giving effect to their contracts with the Brotherhood or recognizing the Brotherhood as the exclusive representative of their employees (R. 127–30).

On November 18 and 19, 1937, petitioners and the Brotherhood,[5] respectively, filed in the court below their separate petitions to review and set aside the Board's order under Section 10 (f) of the Act (R. 1473–1691). The Board answering the petitions prayed for the enforcement of its order in full (R. 1691–1725). Petitioners replied to the Board's answers (R. 1726–35). On petition filed, the United was permitted to intervene (R. 1735, 1737). On March 14, 1938, the court below rendered an opinion upholding the Board's order in full (R. 1737–47). A decree of enforcement was entered on March 21, 1938 (R. 1748).

ARGUMENT

INTRODUCTION

The petition should be denied because the single important question raised by petitioners is governed by decisions of this Court. As the court below held, the jurisdiction of the Board to issue the challenged order is fully supported by the principles declared by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases at the last term—principles recently reaffirmed and applied in *Santa Cruz Fruit Packing Co.* v. *National Labor Rela-*

[5] Although the Brotherhood had notice of the proceeding before the Board, it did not intervene and become a party to that proceeding (Bd. Exh. 1, R. 16–8, 34–6). Its participation in the proceeding before the court below was as a "person aggrieved" under Section 10 (f) of the Act.

tions Board, decided March 28, 1938. The procedural questions raised by petitioners are without substance and are unimportant. As to the first, the question of the effect of petitioners' contracts with the Brotherhood had been put in issue by petitioners themselves, and the Board was amply warranted in passing upon the validity of the contracts and in ordering petitioners to cease and desist from giving them effect. The complaint charged petitioners with unlawful coercion of employees in violation of Section 8 (1) of the Act, and the proof established that the contracts were executed, after issuance of the complaint, in continuation and culmination of the coercion charged; the issue of coercion in all its aspects petitioners had full and fair opportunity to meet. As to the second question, the absence of a report by the Trial Examiner entails no denial of due process. *Morgan* v. *United States*, 298 U. S. 468. Nor, finally, is any such question raised by the discretionary refusal of the Board to grant a two-week adjournment of the hearing to take the testimony of witnesses available when the adjournment was requested. In any event, petitioner is foreclosed from raising any such question here because of its failure to avail itself of its clear statutory right to apply to the court below for leave to adduce testimony from the witnesses in question.

I

THE HOLDING OF THE COURT BELOW THAT THE ACT MAY VALIDLY BE APPLIED TO PETITIONERS IS IN ACCORDANCE WITH THE PRINCIPLES APPROVED BY THIS COURT AT THE LAST AND DURING THE CURRENT TERM; THOSE PRINCIPLES ARE SO FULLY CONTROLLING OF THE PRESENT CASE AS NOT TO REQUIRE REVIEW BY THIS COURT

The court below, upon a consideration of the facts of this case, properly found the petitioners' operations to fall within the principles definitive of the jurisdictional scope of the Act as announced by this Court at the last term. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58. The correctness of the court's holding is confirmed by the decision of this Court at the present term in *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, decided March 28, 1938.

The test of jurisdiction laid down in the *Jones & Laughlin* case is satisfied in any case in which "stoppage of * * * operations by industrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce (301 U. S. at 41). Where such interruption would occur, the Court pointed out, unfair labor practices on the part of employers, shown by long experience to be "prolific causes of strife," have a

"close and intimate relation" to interstate commerce and are subject to federal regulation under this Act (301 U. S. at 42, 43). Upon "the facts as to respondent's enterprise" in that case, the Court held that a stoppage of its manufacturing operations would have "a most serious effect upon interstate commerce"—one which "would be immediate and might be catastrophic" (301 U. S. at 41). The effect upon interstate commerce there considered, however, was moderate in comparison with the far-reaching and instantaneous effect which, it has been established, a cessation of petitioners' operations would have upon a host of interstate activities.

The major portion of petitioners' raw materials, supplies, and equipment come from states other than New York, where petitioners' operations are carried on (*supra*, pp. 8–9). In 1936 petitioners consumed nearly 5,000,000 tons of coal and 115,000,000 gallons of oil which had been brought from without the State. Apart from all else, these huge movements in interstate commerce and the need of protecting them from interruption or cessation are sufficient to bring petitioners within the jurisdictional scope of the Act under the test laid down in the *Jones & Laughlin* case and reiterated in the *Santa Cruz* decision.

It is of no significance that petitioners' operations in interstate commerce relate to incoming raw materials rather than to outgoing finished products. The decisive principles recognize no distinction be-

tween effects upon incoming or upon outgoing commerce, or effects upon both. In declining to accept a contrary contention in the *Santa Cruz* case, this Court reiterated its pronouncement in the *Jones & Laughlin* decision that:

> The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources.

But a cessation of petitioners' operations would have an effect upon interstate and foreign commerce far more immediate and important than the effect represented by the interruption of the interstate movement of petitioners' raw materials. Without more, stoppage of petitioners' operations would instantaneously block all interstate transportation to and from the nation's foremost commercial center on three interstate railroads—the New York Central, New York, New Haven, and Hartford, and Hudson and Manhattan—and all interstate and foreign communication by radio, telegraph, or telephone. Interstate ferries, tunnels, steamship companies plying in the foreign and coast-wise trade, and even the mails, all would be substantially crippled for lack of the electrical power used in the operation of their piers, wharves, terminals, and tubes. Devices in aid of navigation in and out of the port of New York would likewise

cease functioning. And the myriad of other enterprises engaged in interstate and foreign commerce in the area served by petitioners, some of which have previously been named (*supra*, pp. 9–10), would be as effectively forced to curtail or abandon their operations, both for lack of power necessary for their plants and equipment and by the stalling of the agencies and instrumentalities of interstate and foreign commerce necessary to the conduct of their affairs.

Plainly the court below, in heeding the "result upon commerce of a labor dispute between the petitioners and their employees," properly held that the effects of such a dispute cannot be regarded as "indirect and remote" (R. 1741). To have held otherwise would have been to disregard the injunction of this Court in the *Jones & Laughlin* case that such effects must be weighed in the exercise of "a judgment that does not ignore actual experience" (301 U. S. at 42.)*

In opposition to these plain bases of the Act's application to their operations, petitioners contend (1) that they are engaged "primarily and exclusively in local activity" (pet., p. 20); (2) that

* See the evidence of the serious effect of a short circuit at petitioners' Hell Gate generating station on January 15, 1936 (Bd. Exh. 2, R. 1357–8). At page 106 of the brief submitted by petitioners to the Board, July 15, 1937, it was admitted that: "In a delicate and intricate mechanism such as respondents' generating and distributing systems, one * * * employee * * * may cause a suspension of the service on which millions of people depend."

even if a stoppage of their operations would have the immediate and obstructive effects upon interstate and foreign commerce described above, the local effects would be greater and that, therefore, petitioners should be subject to regulation solely by the State of New York (pet., pp. 21–22); and (3) that the commerce which a cessation of their distribution operations would obstruct is that of other enterprises (pet., pp. 12–13).

None of these contentions has merit. The first is advanced in complete disregard of the fact that petitioners' purchases and receipts of huge quantities of raw materials are transactions unquestionably in interstate commerce.[7] Cf. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Local 167* v. *United States*, 291 U. S. 293.

Petitioners' second contention is similar to that made and rejected in the *Santa Cruz* case. This Court has frequently declared that the federal power is paramount, and that where it cannot be exercised to protect interstate commerce without at the same time protecting intrastate transactions inseparable from the interstate, it may be applied to the whole. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, decided March 28, 1938; *National Labor Relations Board* v. *Jones*

[7] Especially inaccurate and misleading is the repeated assertion by petitioners that they "are concededly not engaged in 'commerce' as defined in the Act" (brief, pp. 10, 12).

& Laughlin Steel Corp., 301 U. S. 1; *Second Employers' Liability Cases*, 223 U. S. 1, 51; *The Shreveport Case*, 234 U. S. 342, 251; *Minnesota Rate Cases*, 230 U. S. 352; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588.

Petitioner repeatedly suggests that it would be more appropriate for their labor relations to be governed by the New York Labor Relations Act. But the fact that New York has enacted a statute similar to the federal law is irrelevant to the question of federal power. The power of Congress to prevent serious interruptions to interstate commerce must be the same in all the states; whether that power should on occasion yield to state action under similar state legislation is entirely a matter of legislative policy and not of constitutional law.

Nor is it material that the interstate and foreign commerce which a cessation of petitioners' distribution operations by industrial strife would curtail and block is "carried on by others" (brief, p. 19). That "it is the effect upon commerce, not the source of the injury, which is the criterion" of the exercise of the commerce power, and that the power may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten" it, this Court has repeatedly made clear. As in the *Santa Cruz* case, the sole question here presented is whether "the unfair labor practices involved have * * * a close

and substantial relation to the freedom of interstate commerce from injurious restraint * * *." Formalities of ownership and title are beside this issue. It is commerce, not the commerce of particular enterprises, with which the Act and the commerce power are concerned.[8] Here, as has been shown, cessation of operations at petitioners' plants would instantaneously stop a substantial portion of all the interstate commerce centered about New York City.

Since the Act may validly be applied to prevent obstruction to interstate commerce, and since the cessation of petitioners' operations because of industrial strife occasioned by unfair labor practices would constitute such an obstruction in catastrophic degree, the holding of the court below, conforming in all respects with principles consistently declared by this Court to be applicable, presents no question of jurisdiction warranting review here.

---

[8] An incident in petitioners' own experience graphically illustrates the point under discussion. In 1936 petitioners took over two generating stations theretofore operated by the New York Central Railroad (R. 1246). At the time that these stations were being operated by the railroad, no one would deny that an interruption of their service would constitute a direct and serious effect upon interstate commerce. In no respect whatever has that relationship been altered by the technical change in ownership. The "work done" and "its relation to interstate commerce" is the same. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 557.

II

THE BOARD'S PROCEDURE IN THIS CASE WAS ENTIRELY PROPER; PETITIONERS' CLAIMS THAT THEY WERE DENIED DUE PROCESS ARE WITHOUT MERIT AND REQUIRE NO REVIEW BY THIS COURT

A. *Paragraph 1 (f) of the Board's Order Requiring Petitioners to Cease and Desist from Giving Effect to their Collective Bargaining Contracts Was in all Respects Valid and Proper Under the Act*

Petitioners' attack upon the validity of Paragraph 1 (f) of the Board's order, requiring them to cease and desist from giving effect to their contracts with the Brotherhood, is without substance. Petitioners apparently do not question, and could not successfully question, that this part of the order is supported by the findings and the evidence, and that, being so supported, it is authorized by the Act.[9] The Board found that permeating all of the petitioners' coercive conduct was the illegal purpose to force the employees into joining

[9] Question (7) of the "questions presented" (pet. 7, p. 11), which is the only one relating to this aspect of the order, deals solely with the charge that petitioners did not have a proper hearing. It seems plain that the fifth specification of error (*id.* 17) is intended to have no broader scope. The reasons relied on for the granting of the writ (*id.* 12–15) contain no reference to any question concerning the contracts. In the petition for certiorari (No. 957) to review the decision of the court below filed by the Brotherhood, and its local unions, the substantive validity of this part of the Board's order is challenged.

the Brotherhood to the exclusion of the United or of any other labor organization. A series of uncontested findings (see pp. 11–13, *supra*) compel the conclusion that the contracts were not only a part but the culminating objective of this unlawful campaign to stifle the free inclinations of the employees in their choice of representatives. Such contracts are illegal. *United States* v. *Reading Co.*, 226 U. S. 324, 357; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Schenck* v. *United States*, 249 U. S. 47, 52; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 465–466.[10] In these circumstances it was "an inference of fact to be drawn by the Board from the evidence reviewed in its subsidiary findings" (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, decided February 28, 1938) whether the contracts, if continued in effect, would secure petitioners in the enjoyment of illegal benefits procured by their violation of Section 8 (1) of the Act, and would irreparably injure the employees in the exercise of their rights guaranteed by Section 7 of the Act. The Board's conclusion (R. 103) that Paragraph 1 (f) of the order was

[10] In the *Reading* case this Court held with respect to analogous circumstances under the Sherman Act:

"It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent * * *. But a series of such contracts, if the result of a concerted plan or plot between the defendant * * * would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful."

necessary "to establish conditions for the exercise of an unfettered choice of representatives" is clearly reasonable as an inference of fact The decisions in the *Greyhound* cases are ample authority for the validity of the order as a matter of law.[11]

The grounds of petitioners' attack upon Paragraph 1 (f) of the order are procedural only. It is urged that the question of the validity of the contracts was not properly raised in the complaint or at the hearings, and that the order, therefore, deprives them of their property without due process of law. This contention is without merit.

The complaint specifically charged petitioners with having violated Section 8 (1) of the Act by coercing their employees to join the Brotherhood (R. 15). Petitioners were thus unmistakably informed that their relationship with the Brotherhood was claimed to have been tainted by violation of the Act, and was to be the subject of investiga-

[11] It should be noted that the order does not preclude the possibility of the Brotherhood representing, and making contracts for, the employees after the effects of the petitioners' illegal interference have been cured by enforcement of the Board's order. Under the circumstances presented to it, however, the Board could reasonably infer that the contracts constitute an effective bar to a free choice, and that not until the order is enforced and the obstruction of the contracts removed will the employees be able freely to exercise their statutory right to select any collective bargaining agent they desire, including, of course, the Brotherhood. Until the effects of the unfair labor practices have been dissipated, claims of membership on behalf of the Brotherhood are, of course, immaterial.

tion at the hearings.[12] The the hearings it was brought out that the contracts were made for the purpose of throttling free self-organization and were one of the means of coercion utilized by petitioners in violation of this Section—indeed, that they were the culmination and the fruit of the coercion. Clearly it was not necessary that the complaint should specify in advance the details of the methods adopted by petitioners to violate the Act; it was the purpose of the hearings to inquire into those details. Nor is it a function of a complaint under the Act to declare the legal consequences which may attach to violations of the Act.

It would thus plainly have been proper for the Board, even over the objection of petitioners, to introduce evidence concerning the contracts and, in deciding the issue of coercion, to pass upon their validity and effect. In point of fact, however, petitioners themselves introduced evidence concerning the contracts, and raised the issue of their effect, amending their answers so as to set them

[12] Paragraph 22 of the original complaint which charged that petitioners had coerced their employees into joining or assisting the Brotherhood, alleged that this conduct was an unfair labor practice within the meaning of Section 8 (1) of the Act. It is true that Paragraph 23, which contained the express allegation that the activities enumerated in preceding paragraphs affected commerce, omitted to refer to Paragraph 22. But this omission—which would have rendered the paragraph entirely superfluous and meaningless if it were given any significance whatever—was corrected by amendment on June 14, before the hearing was far advanced.

up as a defense (R. 71). All of the contracts, it is to be recalled, were executed after the issuance of the complaint which questioned the relationship between petitioners and the Brotherhood. Three of the contracts were executed, and all were amended, after the hearings had actually begun and evidence had been introduced concerning petitioners' coercion of their employees to join the Brotherhood. Having thus attempted to cement their questioned relationship with the Brotherhood in the face of the formal charges pending against them, petitioners came before the Examiner and asserted (R. 1200–1201) that execution of the contracts had rendered moot the issue of coercion. Because of the introduction of this defense, if for no other reason, the question of the effect and hence of the validity of the contracts was necessarily before the Board.

Petitioners complain that counsel for the Board did not at the hearing expressly assert the invalidity of the contracts. Apart from the fact, as just stated, that petitioners' own defense involved this question, the whole course of the proceedings necessarily directed attention to it. The great part of the testimony—substantially all of it except that relating to the discharges and to the use of labor spies [12]—bore directly upon the issue of coercion

[12] There was also an issue of contributing financial or other support to the Brotherhood in violation of Section 8 (2) (not of domination of the Brotherhood, as the peti-

of employees in violation of Section 8 (1). The question of the effect of the contracts—involving as it did the relief to be accorded if the charge were sustained—was integrally bound up in this issue, which petitioners had full and fair opportunity to meet. In such circumstances it is idle to contend that petitioners were surprised when the Board inquired into the contracts and issued an order respecting them. Even if petitioners had been surprised, moreover, their remedy would not be a ruling defeating any order respecting the contracts, but an opportunity to present fresh evidence and argument concerning them. Neither in the court below nor in the petition in this Court have they suggested that any evidence exists which they were misled into failing to introduce. If petitioners had such evidence, they were free to apply to the court below for leave to adduce it and to present argument concerning it, which they did not do.

In these circumstances it is plain that no question worthy of review by this Court is presented; petitioners themselves, it is to be noted, do not advert to the question as one of the "reasons relied on for the issuance of the writ" (see Pet., pp. 12–15).

---

tion, pp. 8, 11, 23, erroneously asserts), but this issue did not bulk large in the evidence, and the charges under subdivision (2) were dismissed without prejudice by the Board (R. 130).

B. *The Transfer of the Proceedings to the Board in Washington, Before Filing of an Intermediate Report by the Trial Examiner, Raises no Constitutional Issue*

Petitioners next contend that they were denied due process of law by reason of the fact that at the conclusion of the hearings before the Trial Examiner, no Intermediate Report was filed by the Trial Examiner, but the proceeding was transferred by order of the Board and continued before it in Washington. While the usual practice of the Board is to permit the Trial Examiner to file an Intermediate Report, it is clear that occasional departures from this practice, fully according with Sections 37 and 38 of the Board's Rules and Regulations—Series 1, as amended, raise no question of infringement of statutory or constitutional right. *Morgan* v. *United States,* 298 U. S. 468, 478.

Aside from the fact that oral argument has never been held to be a requirement of due process, it is not true, as stated by petitioners in their petition (p. 17), that they had no opportunity to be heard by the Board in Washington. Petitioners never applied to the Board for oral argument on this case. They did submit a brief to the Trial Examiner (R. 71) which the Board considered. In no case in which application for oral argument has been made before a decision has it been denied by the Board.

C. *Petitioners' Contention that the Board Improperly Refused to Hear Evidence in their Behalf is Without Merit*

There is no merit in petitioners' contention that they were denied due process of law by reason of the fact that the Board refused to hear evidence sought to be introduced on their behalf. The facts as to this contention, which relates only to a single one of the discharges found by the Board to have been unlawful, have already been set forth (*supra*, pp. 5–7). At the close of the Board's case petitioners were given full opportunity to produce all available witnesses then or on the succeeding day (R. 1311). At the adjourned hearing the witnesses theretofore unavailable were heard. Thereafter, petitioners did not apply to the court below for leave to adduce additional evidence, as they were entitled to do under Section 10 (e) of the Act, although their right to make such application was specifically called to their attention by the Board's answer in the court below (R. 1698–1699). Petitioners may not claim that their statutory or constitutional rights were infringed by reason of their failure to pursue them. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

CONCLUSION

The judgment below is correct and in accord with this Court's decisions. There is no conflict among the Circuit Courts of Appeals. The petition should be denied.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

HENRY M. HART, JR.,
Attorney.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
SAMUEL EDES,
Attorneys,
National Labor Relations Board.

APRIL 1938.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

SEC. 10 (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and

desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of

the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under subsection (e), * * *.

U. S. GOVERNMENT PRINTING OFFICE 1939